Pembinaan Pau Wah Sdn Bhd v Wira Tertib Sdn Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–54 OF 1999
LOW HOP BING J
29 APRIL 2008

Contract — Building contract — Delay — Late delivery — Payment — Plaintiff claiming balance of purchase price — Defendant claiming for damages incurred as a result of late delivery and works remaining unfinished — Whether parties had proved their claims

The plaintiff agreed to construct a confectionary factory/office building ('the building') for the defendant based on the drawings and specifications prepared by Akitek KHP of Melaka ('the architect') for RM2,450,000. It was also agreed that the plaintiff would take possession of the site on 9 September 1996 to commence construction and the work was to be completed on 5 December 1996. Subsequently, the architect issued five interim certificates for payment to which the defendant effected payment of RM1,500,000 with an outstanding balance of RM900,000, being the amount the plaintiff was sued for. However, the plaintiff only completed the building on 30 April 1998 which the defendant accepted and inspected on the same date. The defendant stated that the late delivery caused damages to the defendant as the defendant was unable to proceed with a tenancy pursuant to a tenancy agreement dated 12 July 1996 or the sale of the building, pursuant to a sale and purchase agreement dated 3 July 1997. Based on this, the defendant counterclaimed for RM251,000. The defendant also stated that it had incurred additional expenses for, inter alia: the non-suspended floor was defective as it had not been constructed to specifications and had to be demolished and redone, floor finishing works, construction of brick partitions as there were no internal walls, plastering works on the walls, painting works, ceiling finishes and sub-cabling works which remained undone and other works.

Held:

(1) The plaintiff had proved its claim in the sum of RM900,000, and in accordance with s 11 of the Civil Law Act 1956 ('s 11'), interest at 8% pa from the date the cause of action arose ie 10 May 1998 to the date of realisation. The defendant had also proved its counterclaim,

RM251,000 as liquidated damages for late delivery, with interest under s 11, at 8% pa from 15 May 1998 until the date of realisation; RM256,330, being the loss incurred by the defendant towards the construction costs of the defective non-suspended floor, with interest under s 11, at 8% pa from 6 April 1999 to the date of realisation and RM480,557.43 sought by the defendant being the losses incurred by the defendant due to the plaintiff's other defective and incomplete works as particularised, with interest under s 11, at 8% pa from 6 April 1999 to the date of realisation (see para 25).

(2) The judgment sum together with interest awarded to the plaintiff and the defendant respectively shall be mutually offset and the excess, if any, shall be paid by one party to the other (see para 26).

[Bahasa Malaysia summary

Plaintif telah bersetuju untuk membina kilang konfeksi/bangunan pejabat ('bangunan tersebut') untuk defendan berdasarkan lukisan dan spesifikasi yang disediakan oleh Akitek KHP di Melaka ('arkitek tersebut') untuk RM2,450,000. Ia juga dipersetujui bahawa plaintif akan mengambil milikan kawasan itu pada 9 September 1996 untuk memulakan pembinaan dan kerja tersebut hendaklah disiapkan pada 5 Disember 1996. Berikutan itu, arkitek tersebut telah mengeluarkan lima sijil sementara untuk bayaran yang mana defendan telah membayar RM1,500,000 dengan baki yang perlu dibayar sejumlah RM900,000, yang merupakan jumlah yang plaintif kena saman. Walau bagaimanapun, plaintif hanya menyiapkan bangunan tersebut pada 30 April 1998 yang telah diterima dan diperiksa oleh defendan pada hari yang sama. Defendan menyatakan bahawa penyerahan lewat telah menyebabkan kerugian kepada defendan kerana defendan tidak dapat meneruskan penyewaan menurut perjanjian penyewaan bertarikh 12 Julai 1996 atau jualan bangunan tersebut, menurut perjanjian jual beli bertarikh 3 Julai 1997. Berdasarkan ini, defendan telah menuntut balas untuk RM251,000. Defendan juga menyatakan bahawa ia telah mengeluarkan belanja tambahan untuk, antara lain: lantai yang tidak tergantung adalah cacat kerana ia tidak dibina mengikut spesifikasi dan perlu diruntuh dan dibuat semula, menghabiskan kerja-kerja menyiapkan lantai, pembinaan sesekat batu bata kerana tidak ada dinding dalaman, kerja-kerja plaster pada dinding, kerja-kerja mengecat, menghabiskan kerja-kerja membuat siling dan kerja-kerja sub-pengawatan yang masih tidak selesai dan kerja-kerja lain.

Diputuskan:

(1) Plaintif telah membuktikan tuntutannya dalam rjumlah RM900,000, dan menurut s 11 Akta Undang-Undang Sivil 1956

('s 11'), faedah pada kadar 8% setahun dari tarikh kausa tindakan timbul, iaitu 10 Mei 1998 hingga tarikh realisasi. Defendan juga membuktikan tuntutan balasnya, RM251,000 sebagai ganti rugi boleh dikira kerana penyerahan lewat, dengan faedah di bawah s 11, pada kadar 8% setahun hingga 15 Mei 1998 hingga tarikh reaslisasi; RM256,330, yang merupakan kerugian yang ditanggung oleh defendan untuk kos pembinaan untuk lantai rosak yang tidak tergantung, dengan faedah di bawah s 11, pada kadar 8% setahun dari 6 April 1999 hingga tarikh realisasi dan RM480,557.43 yang dipohon oleh defendan iaitu kerugian yang ditanggung oleh defendan akibat kerja-kerja lain plaintif yang defektif dan tidak siap seperti yang diperincikan, dengan faedah di bawah s 11, pada kadar 8% setahun dari 6 April 1999 hingga tarikh realisasi (lihat perenggan 25).

(2) Jumlah penghakiman bersama faedah yang diawardkan kepada plaintif dan defendan masing-masing hendaklah saling menimbangi dan selebihnya, jika ada, hendaklah dibayar oleh satu pihak kepada yang satu lagi (lihat perenggan 26).]

Notes

For cases on delay in building contracts, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2830–2844.

Legislation referred to

Civil Law Act 1956 s 11

Anthony Chua (HS Lee Chua & Partners) for the defendant.
Sekar Palaniandy (Sekar, S Ramakrishnan & Partners) for the plaintiff.

LOW HOP BING J:

CLAIM AND COUNTERCLAIM

[1] In this writ action, the plaintiff's claim is based on a construction agreement made between the plaintiff and the defendant on 25 October 1996 ('the agreement'). The plaintiff seeks to recover from the defendant a sum of RM900,000 together with interest at 8% pa from 10 May 1998 to the date of realisation; and costs.

[2] The defendant's counterclaim against the plaintiff is for damages, arising from the plaintiff's late delivery; defective non-suspended floor, in addition to other defective and incomplete works, together with interest at 8% pa from 6 April 1999 to the date of realisation; and costs.

[3] The merits of the plaintiff's claim and the defendant's counterclaim respectively revolve around issues of facts.

BALANCE UNDER AGREEMENT

[4] Under the agreement, the plaintiff agreed to construct a confectionary factory/office building ('the building') for the defendant on Lot PT 46, Masjid Tanah Industrial Estate, mukim of Sungai Baru Tengah, district of Alor Gajah, based on the drawings and specifications prepared by Akitek KHP of Melaka ('the architect'). The consideration for the construction is RM2,450,000 and payments are dependent on the architect's interim certificates. Other terms and conditions of the agreement include:

(1) the plaintiff's right to take possession of the site on 9 September 1996 so as to commence construction; and

(2) the plaintiff's obligation to complete the works, inclusive of preliminaries, on the agreed completion date of 5 December 1996.

[5] Pursuant to the agreement, the architect issued five interim certificates for payment, the particulars of which are:

Date	certificate No M 9619/PP	Amount (RM)
30 October 1996	1	367,500
25 November 1996	2	538,187
30 December	3	649,489
13 March 1997	4	636,096
25 April 1998	5	258,728
	Total	2,450,000

[6] Towards the account of the five interim certificates, the defendant effected a total payment of RM1,500,000, leaving an outstanding balance of RM900,000. In relation to this outstanding balance, interest would accrue next after 14 days from the date of certificate No 5 dated 25 April 1998 ie from 10 May 1998. It is my specific finding that the plaintiff has proved this claim for the outstanding balance of RM900,000 against the defendant.

THE PLAINTIFF'S LATE DELIVERY

[7] The defendant's letter dated 6 May 1998 to the architect confirmed:

(1) the plaintiff's actual completion of the building on 30 April 1998; and

(2) the defendant's inspection and acceptance thereof on the same date.

[8] Under cross-examination, the plaintiff's witness SP1 conceded to the late delivery. The plaintiff had not applied to the architect for extension of time.

[9] The architect (SP3) testified that there was delay in the completion of the building when it was handed over to the defendant on 28 April 1998.

[10] According to defendant's witness, SD5, the plaintiff's late delivery has caused damages to the defendant in that the defendant was unable to proceed with the tenancy pursuant to the tenancy agreement dated 12 July 1996, or alternatively the sale of the building, pursuant to sale and purchase agreement dated 3 July 1997.

[11] Based on the plaintiff's late delivery, the defendant is making a counterclaim of RM251,000 for the period from 15 December 1996 to 28 April 1998 at RM500 per day. The particulars of computation are as follows:

	Late delivery	Damages
(1)	15 to 31 December 1996 (RM500 x 17 days)	8,500
(2)	1 January 1997 to 31 December 1997 (RM500 x 365 days	182,500
(3)	1 January 1998 to 28 April 1998 (RM500 x 120 days)	60,000
		251,000

[12] I am of the view that the defendant has succeeded in establishing this counterclaim for late delivery at a reasonable sum of RM500 per day against the plaintiff.

DEFECTIVE NON-SUSPENDED FLOOR

[13] SD5 testified that the *non-suspended floor* was defective as it was not constructed according to specifications contained in the ground floor plan drawn by LSK Engineering Consultants viz six inches thickness of concrete with two layers of A7 wire mesh and six inches of hardcore.

[14] The plaintiff had only built the factory floor with three inches thickness of quarry dust/waste, as a result of which it had to be demolished and re-done. This was confirmed by Lead Engineering Consultants appointed by the defendant.

[15] Cross-examination of SP1 reveals that the thickness of the concrete and hardcore layers are important for the building.

A **[16]** Restoration works had to be carried out to the non-suspended floor in order to meet the new machinery installation works. The invoice for this purpose showed that the defendant had paid a sum of RM256,330.

OTHER DEFECTIVE AND INCOMPLETE WORKS

B

[17] On the *floor finishes*, cross-examination of SP1 shows that there was a need for mechanically trowelled smooth finishes including the demolition of floor hardeners to the floor within the production area at a cost of RM77,200 C which the defendant has incurred.

[18] SD5 testified that there were no *internal walls in the production area* of the building. Hence, the defendant had to construct brick partitions of 10 feet high in the production area covering 5130 sq ft out of a total area of D 7,235 sq ft and the cost thereof amounted to RM60,380. The defendant is making a claim of 70.9% of the total area not completed, and the amount incurred was RM42,809.42.

E **[19]** In relation to the *plastering works on walls*, the defendant's counterclaim is based on the percentage of the plastering not completed and that was 39.6% amounting to RM24,620.32, based on the total area of internal and external walls of 12,947 sq ft.

F **[20]** SD5's evidence was that since there were *no internal walls within the production area*, there were no painting works, and so the defendant had counterclaimed a deduction in the sum of RM13,618.44 being 39.6% of the painting works not done, based on the total area of 12,947 sq ft for internal and external walls.

G

[21] SD5 testified that *ceiling finishes* were not done by the plaintiff in the areas of 'works in progress for the cream biscuit section and shell biscuit section and so the defendant is making a counterclaim of RM69,730.

H

[22] SD5's evidence also established that the plaintiff has not done the *sub-main cabling works* as the internal walls in the production area were not constructed, and the defendant had counterclaimed a deduction of RM12,806.25.

I

[23] SD5 also testified that the internal walls surrounding the production area were not constructed by the plaintiff and that has resulted in other works not completed, in which case, the defendant has suffered losses which are particularised as follows:

	Incomplete works	Loss incurred by defendant (RM)
(1)	67% of lighting points and power points	25,913
(2)	Fixtures	58,830
(3)	Fire Extinguisher	17,860
(4)	Internal Road Works	81,400
(5)	Shortfall in the number of doors and windows	60,770

[24] As a result of the plaintiff's defective and incomplete works, the defendant in the written submission has made a counterclaim against the plaintiff amounting to RM480,557.43 although the total sum under this head is actually RM485,557.43.

CONCLUSION

[25] On the foregoing grounds, I hold that the plaintiff and the defendant have proved their claim and counterclaim respectively. I therefore give judgment as follows:

(1) in relation to the plaintiff's claim, in the sum of RM900,000, and in accordance with s 11 of the Civil Law Act 1956 ('s 11'), interest at 8% pa from the date the cause of action arose ie 10 May 1998 to the date of realisation; and

(2) in relation to the defendant's counterclaim:

(a) RM251,000 as liquidated damages for late delivery, with interest under s 11, at 8% pa from 15 May 1998 until the date of realisation;

(b) RM256,330, being the loss incurred by the defendant towards the construction costs of the defective non-suspended floor, with interest under s 11, at 8% pa from 6 April 1999 to the date of realisation; and

(c) RM480,557.43 sought by the defendant being the losses incurred by the defendant due to the plaintiff's other defective and incomplete works particularised above, with interest under s 11, at 8% pa from 6 April 1999 to the date of realisation.

[26] The judgment sum together with interest awarded to the plaintiff and the defendant respectively shall be mutually offset and the excess, if any, shall be paid by one party to the other.

A **[27]** As the position of the plaintiff and the defendant respectively had been placed in equilibrium, each party shall bear its own costs.

Order accordingly.

B

Reported by Chew Phye Ken

C

D

E

F

G

H

I